United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4130

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4130

DIGNA BALLENILLA-GONZALEZ,
Petitioner,

—*against*—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney,

RICHARD J. MCCARTHY,
Assistant United States Attorney,
Of Counsel.

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AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Immigration and Nationality Act, § 106(a)(i) 66 Stat. 163 (1952), *as amended*, 8 U.S.C. § 1105a

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States

pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

Immigration and Nationality Act, § 242(b)(2), *as amended*, 8 U.S.C. § 1252

(b) . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

* * * * *

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

Relevant Regulations

Title 8, Code of Federal Regulations [CFR]:

§ 103.5 Reopening or reconsideration—

. . . a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has

jurisdiction over the proceeding or who made the decision.

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(6) *Employment.* A nonimmigrant student is not permitted to engage in off-campus employment in the United States either for an employer or independently, unless his application to do so has first been approved by the Service.

§ 242.16 Hearing.

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If . . . the special inquiry officer is satisfied that no issue of low or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent.

§§ 244.1 Application.

. . . if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States a special inquiry officer in his discretion may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the special inquiry officer when first authorizing voluntary departure, and under such conditions as the district director shall direct.

§§ 244.2 Extension of time to depart.

Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4130

DIGNA BALLENILLA-GONZALEZ,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, Digna Ballenilla-Gonzalez ("Petitioner") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals ("Board") on December 4, 1975. The Board's order: (1) dismissed Petitioner's appeal from a finding of Immigration Judge Eugene C. Cassidy that she was deportable for having remained in the United States beyond her authorized stay; and (2) reversed the Immigration Judge's finding that Petitioner was ineligible for the privilege of voluntary departure and granted her voluntary departure

within thirty days of the date of the order (AR 12-16,* JA 2-5 **).

It is the Immigration and Naturalization Service's ("Service") position that the petition for review should be dismissed because: (1) an overstay nonimmigrant student alien has no right under the due process clause of the Fifth Amendment to counsel at government expense in her deportation hearing; and (2) the due process protections accorded Petitioner in her deportation proceeding satisfied the requirements of the Fifth Amendment and resulted in a fair hearing.

Issues Presented

1. Has an overstay nonimmigrant student a constitutional right to counsel at government expense in a deportation proceeding?

2. Did the protections accorded Petitioner in her deportation proceeding comply with statutory and constitutional due process requirements, resulting in a fair hearing?

3. Did the Board properly exercise its discretion in granting Petitioner the privilege of voluntary departure within thirty days?

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* References preceded by the letters "AR" are to the certified administrative record previously filed with the court.

** References preceded by the letters "JA" are to the joint appendix previoulsy filed with the court. Reference is made in this brief to both the certified administrative record and the joint appendix because in some instances the joint appendix's reproduction is not legible.

Statement of the Case

The Petitioner, Digna Ballenilla-Gonzalez, is a twenty-six year old alien who is a native and citizen of the Dominican Republic (AR 57, JA 6). Petitioner applied to the United States Embassy for permission to enter the United States to study at Antillian College in Mayaguez, Puerto Rico (AR 57, JA 6). She received this visa, and last entered the United States on January 8, 1974, authorized to remain until May 30, 1974 when her school year would have concluded (JA 51).

In May, at the end of Antillian College's spring term, Petitioner had not received permission from the Service to remain in this country beyond May 30, 1974. She did not return to the Dominican Republic (AR 72, JA 43). Instead, then five months pregnant, she decided to visit relatives in Waterbury, Connecticut (AR 57, JA 6). Although she knew she had to receive an extension of her visa from the Service to make the trip legally, neither Petitioner nor anyone on her behalf applied for such an extension (AR 57, JA 6, 51). As a result, the Service was never given the opportunity to consider whether Petitioner's visa should be extended and, therefore, could not have granted her such an extension (JA 51).

Petitioner's baby was born in Waterbury on September 15, 1974. Petitioner then applied for public assistance from the Waterbury Welfare Office (JA 51-2). At the Welfare Office Petitioner was told that she would not be considered for public assistance until she resolved her immigration status in this country (JA 52). Accordingly, on October 8, 1974, apparently believing that she was eligible to remain here because of her citizen child, Petitioner went to the Hartford office of the Service to apply for permanent residence (AR 58-9, JA 7-8).

At the Service Petitioner was referred to an investigator who told her in Spanish through an interpreter that she would be questioned about her "remaining in the United States beyond May 30, 1974 without permission of the United States Immigration Service" (JA 50). Prior to the commencement of the interview, Petitioner was also advised in Spanish, *inter alia*, that she had a right to remain silent, that she had a right to talk to a lawyer for advice, and, if she could not afford a lawyer, that one would be appointed for her if she wished (JA 50).[1] Petitioner declined this offer and elected to proceed without counsel (JA 50).

During the interview the investigator developed probable cause to believe that Petitioner was in the United States illegally and asked her if she would be willing to leave the United States voluntarily. She said she would if he ordered her to depart (JA 51).

As a result of the interview, the Service commenced deportation proceedings against Petitioner by issuing an order to show cause and notice of hearing on November 4, 1974 (AR 77, JA 48). The order to show cause clearly warned Petitioner that there would be a deportation hearing on November 18, 1974 to determine whether she was deportable for overstaying her nonimmigrant student visa (AR 77, JA 48). It also advised Petitioner of her rights at the deportation hearing, including the right to be represented by counsel at her expense, and told her to bring to the hearing any document she wanted to have

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[1] Had Petitioner requested appointed counsel, it is Service policy immediately to suspend interrogation and to refer the alien to the appropriate local Legal Aid Society or Legal Services Division of the local Office of Economic Opportunity. See I & NS Investigator's Handbook, page 7-8(9) (May 21, 1973). See Addendum, *infra*.

considered with her case (AR 78, JA 49). The order to show cause did not contain the words "permanent resident."

On November 18, 1974 Petitioner's deportation hearing was held before Immigration Judge Cassidy. While Petitioner arrived at the hearing without counsel, she did follow the instructions on the order to show cause concerning any relevant documents by bringing with her a letter from her doctor at the Waterbury Hospital prenatal clinic and her child's birth certificate (AR 70, JA 41). Prior to the commencement of the hearing the Judge inquired whether Petitioner understood the interpreter, which the Service provided for her benefit, and she replied "Yes. Sure." (AR 69, JA 40). The Judge then asked Petitioner if she knew that the hearing was a deportation hearing which would determine whether she would be allowed to remain in the United States. She replied, "Yes." (AR 69, JA 40).

Once the Judge was satisfied that Petitioner understood both the purpose of the hearing and the interpreter present throughout the hearing, he informed her that she had a right to be represented at no cost to the Government. Petitioner, who had previously ignored the investigator's offer of counsel, did not request counsel, apparently because she was confident that her child's birth certificate would excuse her illegal presence in this country (AR 58, 70, 75; JA 7, 41, 46).

The Immigration Judge asked Petitioner if the Service had read and explained the order to show cause to her. When she replied that the Service had only told her it was important, the Judge stopped the hearing and the interpreter read the order to show cause to Peti-

tioner in Spanish (AR 71, JA 42).[2] After the adjournment the Judge again asked Petitioner if she understood the charge contained in the order to show cause. This time she answered, "Yes" (AR 71, JA 42).

The hearing then focused on the allegations contained in the order to show cause. The Judge asked Petitioner if she understood the charge, namely that she had remained without authority in the United States after her student visa expired. When Petitioner replied that she had intended to ask for permission to remain here legally, the Judge directed her thoughts back to the charge in the order to show cause and asked again whether she understood it. Petitioner responded, "Yes" (AR 71, JA 42). The Judge proceeded to question her on each of the allegations contained in the order to show cause. With clear unequivocal affirmative answers Petitioner conceded the truth of all these allegations. In summary, she admitted that she was not a citizen or national of the United States, that she had been admitted to the United States as a nonimmigrant student on January 8, 1974, that she had permission to remain until May 30, 1974, and that she had remained beyond that date without permission (AR 72, JA 43).

Once Petitioner had admitted her deportability the Judge inquired whether she wished to apply for voluntary departure (which, if granted, would permit her to leave the United States at her own expense) in lieu of deportation. Petitioner said that she did not have the money. This response was the first indication to the

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[2] It should be noted that the handwritten notation reflecting the reading in Spanish of the order to show cause appears in the certified administrative record but, due to the method of reproduction used to duplicate the joint appendix, is not legible in the appendix.

Judge that Petitioner might be indigent. But when Petitioner failed to indicate whether there were any funds available to her with which she could leave the country without cost to the Government (AR 73, JA 44), the Judge told her that he would have to enter a deportation order against her (AR 73, JA 44). Petitioner's further statements reveal that she understood the Judge's order, but that she did not believe she could be deported since she had a citizenchild (AR 75, JA 46).

At the close of the hearing the Judge ordered Petitioner deported to the Dominican Republic and denied her application for voluntary departure in lieu of deportation because she lacked funds to pay her way out of the country (AR 75, JA 46). Then the Judge *sua sponte* advised her to see a local Legal Aid Society to help her with her appeal (AR 76, JA 47).

Subsequently, Petitioner did go to the Waterbury Legal Aid Society ("Legal Aid") (AR 60, JA 9). After a review of the facts developed before the Immigration Judge at her hearing, Legal Aid apparently was satisfied that all relevant information pertinent to Petitioner's right to remain in the United States had been introduced and did not move to reopen the hearing. Instead, Legal Aid elected to appeal the Immigration Judge's decision to the Board of Immigration Appeals, contending alternatively that Petitioner was not deportable due to the presence of mitigating circumstances and the absence of due process at her deportation hearing or that, if Petitioner is found to be deportable, she should have been granted the privilege of voluntary departure (AR 34-35, JA 36-37). Prior to the argument of this appeal, Petitioner's attorneys submitted to the Board two affidavits, one signed by Petitioner, setting forth the mitigating factors which allegedly were not presented at

Petitioner's deportation hearing and might have altered the result (AR 57-65, JA 6-15).[3]

On December 4, 1975, after reviewing the entire record, the Board found Petitioner deportable and ordered that portion of her appeal dismissed. However, on the basis of representations by Petitioner that she was willing and had the funds to depart voluntarily from the United States (AR 15, 35; JA 4, 37), the Board reversed the decision of the Immigration Judge and granted Petitioner the privilege of voluntary departure until January 3, 1976. The Board also entered an alternative order of enforced deportation if Petitioner failed to depart voluntarily within the time allotted (AR 16, JA 5).

Petitioner did not depart, nor did she or her attorneys either request an extension of her voluntary departure time or immediately petition this Court to review the Board's decision. She did nothing. Consequently, the Service notified Petitioner to report for deportation on May 18, 1976 pursuant to the alternative order of the Board. On the next day Petitioner filed

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[3] These affidavits, and appellant's brief, devote much attention to such extraneous facts as Petitioner's belief that an Antillian College official had agreed to obtain a visa extension for her until September 13, 1974 (AR 57, JA 6), and that a doctor at Waterbury Hospital had asked the Service in writing not to disrupt Petitioner's prenatal care (AR 62, JA 11). These facts, and any bearing they may have on Petitioner's good faith, were irrelevant to the issue before the Immigration Judge and the Board, namely whether Petitioner had overstayed her student visa that had expired May 30, 1974. Moreover, at the time the order to show cause was issued the birth of Petitioner's baby made any letter relating to pre-natal treatment from Waterbury Hospital moot, and the visa extension which the Antillian College official purportedly claimed she could obtain would have expired prior to the issuance of the November 4, 1975 order to show cause.

her petition for review of the Board's December 4, 1975 decision. Petitioner has since remained in the United States pursuant to the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105(a)(3). September 13, 1976 will mark the third anniversary of Petitioner's first entry into the United States pursuant to her limited student visa.

ARGUMENT

POINT I

Petitioner, An Overstay Nonimmigrant Student, Has No Constitutional Right To Counsel At Government Expense In A Deportation Proceeding.

A) Petitioner has no right to appointed counsel under the due process requirements of the Fifth Amendment.

Petitioner contends initially that when the Service failed to provide her with a lawyer at her deportation proceeding, after she said she could not afford to retain counsel, it denied her right to counsel pursuant to the due process clause of the Fifth Amendment. The lack of merit to this claim is apparent from a brief examination of judicial reasoning applying constitutional due process requirements to civil administrative proceedings.

The courts, aware of the severe problems posed by the illegal entry of aliens into this country, have continually and steadfastly affirmed Congress' plenary power to establish procedures for the admission and expulsion of aliens. *Kliendienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *The Japanese Immigrant Case*, 189 U.S. 86

(1902). The same courts have recognized that such proceedings are civil administrative proceedings, and have rejected requests by permanent resident aliens to extend to deportation hearings the accused's Sixth Amendment guarantees in a criminal trial, including the right to counsel. *Woodby* v. *I.N.S.*, 385 U.S. 276, 285 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952), *reh. denied*, 343 U.S. 936 (1952); *Bugajewitz* v. *Adams*, 228 U.S. 585 (1913). Instead, the courts have only required that the deportation proceedings established by Congress comply with the requirement of fundamental fairness inherent in the due process clause of the Fifth Amendment. *Wong Sung* v. *McGrath*, 339 U.S. 33 (1950).

Implicit in the right to a fair administrative hearing is the opportunity to be represented by counsel.[4] At most this requires that an alien be apprised of his right to be represented, and be afforded an opportunity to obtain counsel. *Henriques* v. *I.N.S.*, 465 F.2d 119 (2d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973); *Casteneda-Delgado* v. *I.N.S.*, 525 F.2d 1294 (7th Cir. 1975). The courts have never applied the right to a fair administrative hearing so as to require the Service to appoint counsel for indigent aliens at government expense, even where the indigent alien was a permanent resident or de-naturalized citizen whose roots in the United States and stake in the outcome of any hearing greatly exceeded that of Petitioner, a nonimmigrant student who has overstayed her limited visa. *Henriques* v. *I.N.S.*, *supra*; *Burquez* v. *I.N.S.*, 513 F.2d 751 (10th Cir. 1975); *Barthold* v. *I.N.S.*,

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[4] This right to counsel at no expense to the Government emanates from Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2) and 8 C.F.R. §§ 242.16(a) and 242.16(b). *Compare* Administrative Procedure Act (APA), 80 Stat. 385(b), (1966), 5 U.S.C. § 555(b)(1969).

517 F.2d 689 (5th Cir. 1975); *Aguilera-Enriquez* v. *I.N.S.*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3397 (U.S. Jan. 13, 1976); *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *Tupacyupanqui-Marin* v. *I.N.S.*, 447 F.2d 603 (7th Cir. 1971); *Di Bernardo* v. *Rogers*, 254 F.2d 81 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 816 (1958).

Under traditional due process analysis the right to counsel at government expense in civil administrative hearings has only been recognized where the respondent's actual liberty was at stake and there was no substantial governmental interest justifying counsel's absence. *In re Gault*, 387 U.S. 1 (1967) (appointed counsel required in State juvenile delinquency proceedings). However, where the requisite governmental interest has been demonstrated or the curtailment of an individual's rights is less severe, the United States Supreme Court has declined to require appointed counsel at a civil administrative proceeding and has elected to review alleged unfairness on a case by case basis. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (intra-prison disciplinary proceedings); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972 (probation revocation hearings), *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits termination hearings).

The Government recognizes that the deportation of a permanent resident alien or de-naturalized citizen may result in some hardship to that alien. See *McLeod* v. *Peterson*, 282 F.2d 180 (3d Cir. 1960) (permanent resident); *United States* v. *Lehmann*, 239 F.2d 663 (6th Cir. 1956) (de-naturalized citizen); *United States* v. *Parrino*, 212 F.2d 919 (2d Cir. 1954) (permanent resident); *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922) (citizen); *Bridges* v. *Wixon*, 326 U.S. 135 (1945) (permanent resident).[5]

[5] These are the decisions relied upon by Petitioner to establish the loss of "liberty" resulting from deportation. (Appellant's Brief, at page 8.)

Nevertheless this deprivation, when compared to that suffered by citizens in *Wolff*, *Gagnon* and *Goldberg*, *supra*, is not sufficiently significant to justify the enormous financial and administrative burden to the Government of requiring counsel to be appointed for every indigent alien.[6] This is especially true in this appeal because Petitioner's interests, as a nonimmigrant student, in remaining in this country are transitory; any loss she might suffer as a con-

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[6] According to the 1975 Service Annual Report, 766,600 illegal aliens were apprehended during that year. Because of the relative ease with which their illegal status can be ascertained, over 80% conceded their deportability and voluntarily left the country. [*See Foti* v. *I.N.S.*, 375 U.S. 217, 227 (1963), *citing* Gordon and Rosenfield, *Immigration Law and Procedure*, § 5.7(a) at 5-78]. The remainder were given hearings involving the same simple question of fact, and most of these aliens were also found deportable. 1975 I.N.S. Ann. Rep., at 90.

Accordingly, the addition of appointed counsel to these proceedings will rarely, if ever, prevent the deportation of the illegal alien. It will, however, greatly increase the cost and reduce the efficiency of the Service's attempts to control this serious domestic problem. In this regard it should be noted that no counsel appeared at Petitioner's hearing to represent the Service. Thus, requiring the appointment of counsel for indigents would also cause the Service to incur the expense of hiring additional counsel of its own to represent it at all hearings.

The statistics relied upon by appellant in her brief are not helpful (Appellant's Brief, at page 17). All the studies referred to are more than forty years old. None segregate their results into overstay alien and permanent resident alien categories where the issues may differ. Consequently, it is difficult to ascertain what value a lawyer could have to those hundreds of thousands of aliens, like Petitioner, who by their own admission have no defense to deportation. If Petitioner is claiming that legal counsel be provided aliens to advise them how best to remain in this country, this contention has been squarely rejected by the Second Circuit, which stated in *Henriques* v. *I.N.S.*, *supra*, at 121, that "it is far-fetched . . . to argue that persons [at a deportation hearing] seeking admission to the United States are entitled to legal advice at government expense on how best to secure such admission."

sequence of deportation would be neither substantial nor unforeseen. *See Pilapil* v. *I.N.S.*, 424 F.2d 6, 11 (10th Cir. 1970), *cert. denied*, 409 U.S. 908 (1970).

Fifth Amendment due process does not require the appointment of counsel in a deportation hearing because of the nature of the proceeding (*i.e.*, civil, not criminal), the limited and unique character of the liberty at stake, and the strong governmental interest in administering its immigration laws timely, efficiently, and without enormous cost. The constitutional test which the Government must satisfy is whether the deportation proceeding taken as a whole, including the presence or absence of appointed counsel, was fundamentally fair. Point II of appellee's brief discusses this standard, and demonstrates that the facts in Petitioner's case do not require the appointment of counsel under this flexible due process standard.

B) Petitioner has no right to appointed counsel pursuant to the equal protection concepts embodied within the due process clause of the Fifth Amendment.

This Court's rejection of Petitioner's contention that she has a constitutionally protected due process right to appointed counsel at her deportation proceeding should be dispositive as well of her equal protection arguments. As Petitioner recognizes, the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause. Accordingly, if Petitioner has any claim, it must emanate from those equal protection concepts embodied within the due process clause of the Fifth Amendment:

> ". . . the concepts of equal protection and due process, both stemming from our American ideal

> of fairness, are not mutually exclusive. The 'equal protection of laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

Petitioner's brief cites no decision in which a statute was held to breach the equal protection concepts inherent in Fifth Amendment due process without violating due process as well.

Assuming *arguendo* that Petitioner can assert a distinct and independent equal protection argument under the Fifth Amendment's due process clause, such a claim founded upon economic discrimination cannot succeed given the facts of Petitioner's case. The standard for determining the constitutionality of alleged discrimination based upon wealth is set forth in *Bolling* v. *Sharpe*, *supra*, at 499, and requires the reviewing court to make the following inquiries:

(1) whether a classification has been made; and if so, the extent of the classification;

(2) whether the classification, if made, infringes upon a fundamental right protected by the Constitution; and

(3) whether the infringement, if it exists, is justified by the requisite governmental interest.

The contentions advanced by Petitioner fail to withstand scrutiny under this standard. Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2), whose constitution-

ality Petitioner is challenging on due process and equal protection grounds, provides an alien with the right to be represented in deportation proceedings at no expense to the Government. It is a neutral statute. It creates no suspect categories,[7] and establishes no classifications. *United States* v. *Kras*, 409 U.S. 434, 466 (1972) (which upheld the constitutionality of the federal filing fee required of all petitioners in bankruptcy proceedings); *Ortwein* v. *Schwab*, 410 U.S. 656, 659 (1972) (*per curiam* opinion which upheld the constitutionality of the Oregon filing fee required of all appellants from adverse administrative agency determinations).

Furthermore, the interests affected by Section 242 (b)(2) of the Act are not fundamental rights protected by the Constitution (*See* Point I(a), *supra*). No Court has attempted to elevate the statutory right of an alien to retain a lawyer into a constitutional requirement of due process. Instead, the Courts have continually recognized Congress' plenary power over immigration, and abstained from interfering in these matters. Thus, the presence or absence of a lawyer at an alien's deportation hearing clearly "does not rise to the same constitutional level" as those fundamental rights—such as the right to vote, the right to a divorce, and the right to due process in a criminal trial—which are involved in the cases cited by Petitioner. Appellant's Brief, at 26; *Cf. San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973). The statute in question is another example of Congress' exercise of its plenary power, which

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[7] The Supreme Court has held that discrimination based upon alienage is constitutionally suspect. *Graham* v. *Richardson*, 403 U.S. 365 (1971). However, the statute in question does not make any classification based upon alienage. Rather, it regulates the nature of the expulsion process, as Congress has the plenary power to do. *Kliendienst* v. *Mandel*, *supra*.

the Supreme Court has upheld. *United States* v. *Kras*, *supra*, at 447.

Since no classification based upon suspect criteria or interference with a fundamental right results from this Congressional legislation, the Court's inquiry into Section 242(b)(2)'s validity cannot be governed by the "strict scrutiny" standard urged by Petitioner. It is limited to ascertaining whether there is a rational justification underlying the statute's enactment. *Id.* at 446; *Ortwein* v. *Schwab*, *supra*, at 660. The national interest in the effective and efficient regulation of illegal aliens at a reasonable cost provides more than ample rational justification for this section of the Act.

POINT II

The Protections Accorded Petitioner In Her Deportation Proceeding Satisfied Statutory And Constitutional Due Process Requirements, And Resulted In A Fair Hearing.

The Supreme Court has consistently affirmed Congress' plenary power over immigration and only subjected this power to the requirement that it be exercised fairly. *Chew* v. *Colding*, 344 U.S. 590 (1953); *The Japanese Immigrant Case*, *supra*. Judicial review of the Board's decision is limited to whether the deportation hearing complied with due process and was fundamentally fair. *Castenada-Delgado* v. *I.N.S.*, 525 F.2d 1294 (7th Cir. 1975); *Aalund* v. *Marshall*, 461 F.2d 710, 711 (5th Cir. 1972); *Kam Ng* v. *Pilliod*, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

The due process requirements of a fair administrative hearing vary with the loss to be suffered by the individual

and the governmental interest in the proceeding. (*See* Point I(a), *supra*). The United States Supreme Court has not required agencies to conform their administrative hearings to the rigid due process requirements of a criminal trial, but has allowed them flexibility in structuring their proceedings so long as fundamental fairness results. *Goldberg* v. *Kelly*, *supra*; *Gagnon* v. *Scarpelli*, *supra*; *see* Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267 (1975).

Pursuant to Congress' plenary power the Service's procedures are an attempt to accord fundamental fairness to the alien in a manner consistent with the national interest. The result, incorporated in the regulations at 8 C.F.R. § 242, grants the alien a number of due process rights in addition to the right to be represented. While Petitioner's brief has chosen to focus on the constitutional extent of the right to counsel, this was only one due process element of Petitioner's hearing, an element which, as the courts have recognized, need not be present in every administrative proceeding to guarantee fundamental fairness. *Goldberg* v. *Kelly*, *supra*.

A) Petitioner was given reasonable notice of the charge against her and of her rights to respond to that charge.

Fundamental to the requirement of due process in any proceeding is notice to interested parties of the pendency of the action and of their right to present objections in an appropriate hearing. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This does not mean that the notice must actually reach the interested party or that the party actually understand what it contains. Due process is satisfied if the notice is reasonably calculated, under all of the circumstances, to apprise interested parties of the action and of their rights concerning that action. *Id.* at 314-15. It does not guarantee that

there will not be a mistaken response to timely notice knowingly received. *Brenner* v. *Ebbert*, 398 F.2d 762, 765 (D.C. Cir. 1968).

That Petitioner received notice of her hearing is not in dispute. The order to show cause was sent by registered mail, and Petitioner signed the return receipt (AR 78, JA 42). However, she contends that she did not understand its significance and, therefore, could not prepare her defense. Appellant's Brief, at 37-38. This argument is belied by the record.

Petitioner claims that when she went to the Service in October, 1974, having been referred there by the Welfare authorities, she believed her past transgressions would be forgiven and she would be permitted to remain in the United States because of the birth of her child (AR 58, 75; JA 7, 46, 51). This belief must have been dispelled by the Service's refusal to allow her to apply for permanent residence and by its insistence that she speak to a Service deportation investigator. Similarly, it is difficult to understand how this belief could have persisted after the investigator had warned Petitioner that he was talking to her solely about her remaining in the United States too long, and that anything she said could be used against her in a subsequent deportation hearing (JA 50). Petitioner was then twenty-four years old, a mother, reasonably well-educated and had been living in the United States for over a year.

Petitioner's position, that after the preliminary interview with the investigator she still was not aware that her presence in the United States was in jeopardy, strains credulity. Likewise, it is difficult to accept Petitioner's purported assumption that the order to show cause was an appointment letter for a preliminary application for residence when she had never been permitted to file such

an application and the order explicitly stated it concerned her possible deportability (AR 77, JA 48).

Under all the circumstances of Petitioner's case the order to show cause was reasonably calculated to apprise Petitioner of the charge against her, thereby satisfying the due process requirement of reasonable notice.

B) Petitioner received a fair hearing in the absence of appointed counsel, effectively waived her statutory right to retain counsel, and was not prejudiced by her waiver of retained counsel.

An important element in a fair hearing is the opportunity to be represented by counsel. The Courts have sustained Congress' implementation of this element of due process through the requirement that an alien be informed of her statutory right to be represented by a lawyer, and be given the opportunity to obtain one. *Henriques* v. *I.N.S., supra; United States ex rel. Wlodinger* v. *Reimer*, 103 F.2d 435, 436 (2d Cir. 1939). Moreover, since deportation proceedings are civil in nature and do not result in confinement, an alien is not entitled to the Sixth Amendment's guarantee of counsel, *Burquez* v. *I.N.S., supra; Martin-Mendoza* v. *I.N.S.*, 499 F.2d 918 (9th Cir), *cert. denied*, 419 U.S. 1021 (1974), *reh. denied*, 420 U.S. 984 (1975), or to the due process clause's guarantee of counsel. *In re Gault, supra; Gagnon* v. *Scarpelli, supra;* see Point I, *supra*. Thus, there is no requirement, either under due process concepts or the Act, that counsel be present in every case. *Henriques* v. *I.N.S., supra; Carbonell* v. *I.N.S.*, 460 F.2d 240 (2d Cir. 1972).

The absence of counsel at a hearing will not, by itself, invalidate the hearing where the alien has been properly informed of his right to be represented, has been given a fair opportunity to exercise this right, and has elected to

proceed without counsel with no resultant prejudice.[8] Before appointed counsel is required by due process in a specific case, the factual circumstances of that case must reflect the need for appointed counsel to insure a fair hearing, *i.e.*, that a counsel's presence and participation would be meaningful and significant. *Gagnon* v. *Scarpelli*, at 790; *Aguilera-Enriquez*, *supra*, at 568-69; *Burquez* v. *I.N.S.*, *supra*, at 755; *Henriques* v. *I.N.S.*, *supra*, at 120-21.

There is no indication counsel at Petitioner's deportation hearing would have affected the outcome of that hearing. Petitioner has engaged counsel for her appeal to the Board and her petition to this Court. This counsel has supplemented the record with two affidavits which presumably contain all the information which would have been presented by Petitioner and appointed counsel at a deportation hearing. None of these "facts" would affect in any way the Immigration Judge's order of deportation, upheld by the Board on appeal, entered upon a finding that Petitioner had overstayed her nonimmigrant student visa. The Waterbury Hospital letter was moot

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[8] Petitioner contends that the specific guidelines set forth in *Gagnon* v. *Scarpelli* concerning the appointment of counsel are equally applicable to a deportation hearing. Appellant's Brief, at 21. The *Gagnon* guidelines relied upon by Petitioner were specifically tailored by the Court to probation revocation hearings, and were arrived at only after a careful analysis of the unique policy and legal considerations involved in a probation revocation determination. The existence of mitigating reasons for an uncontested violation was one such factor central to any probation revocation proceeding.

By contrast, in Petitioner's hearing the sole issue before the Immigration Judge was whether Petitioner had overstayed her visa. Mitigating circumstances, no matter how compelling, were completely irrelevant to that decision. Moreover, had relevant factors failed to be presented at the hearing or surfaced at a later date, Petitioner could have made a motion to reopen her hearing on that basis. 8 C.F.R. § 103.5. Her failure to do so confirms the fairness of the proceeding in question.

before the hearing once Petitioner's baby was born, and the Service had granted no extension to Petitioner's expired student visa (which, in any event, Petitioner had only intended to seek through September 13, 1974).

Second, Petitioner was clearly informed of her right to retain counsel at no expense to the Government and was given the opportunity to engage such counsel, but effectively waived this right. At her preliminary conference with the Service (conducted in Spanish), Petitioner received complete *Miranda* warnings, including being told of her rights to speak to a lawyer before she was questioned and to have a lawyer appointed if she could not afford to retain one (JA 50). Although Petitioner declined the offer, her responses to the investigator's later questions reveal that she understood what the investigator was saying (JA 50-52). Moreover, Petitioner had ample opportunity to obtain counsel during the intervening month between the preliminary conference and the deportation hearing. At the outset of her hearing the Judge advised Petitioner of her statutory right to be represented by counsel (AR 69, JA 40). Petitioner's recognition of the role a lawyer might play in the hearing demonstrates that she understood what she was being told (AR 69, JA 40). The Judge then offered to recess the hearing if Petitioner wished to think about retaining a lawyer, but she declined the offer (AR 70, JA 40).[9]

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[9] Petitioner has argued that the Immigration Judge abused his discretion in failing to adjourn the hearing pursuant to his authority under 8 C.F.R. § 242.13 so that she might seek legal assistance. However, at no point in the hearing did Petitioner claim she was unable to afford a lawyer. Moreover, the Judge had no reason to grant such an adjournment on his own motion. Petitioner was admitted to the country as a nonimmigrant student and, on that basis alone, the Judge had reason to assume she had access to sufficient funds to support herself. In addition, Petitioner made no claim of indigency until she was asked if she could pay her way out of the country, which occurred much later in the hearing. Consequently, there was no reason to grant an adjournment at this point in the proceeding.

The right to be represented by counsel in a deportation proceeding can be waived when an alien, fully aware of her right to counsel, chooses to proceed without counsel. *Burquez* v. *I.N.S., supra; Henriques* v. *I.N.S., supra; United States ex rel. Dentico* v. *Esperdy*, 280 F.2d 71 (2d Cir. 1970). The waiver must be made intelligently and voluntarily, with a full understanding of the right waived. *Burquez* v. *I.N.S., supra.*

The record before this Court demonstrates that Petitioner effectively waived her right to counsel. She was informed on two separate occasions over a month apart that she had the right to retain an attorney. Moreover, at neither time did she inform the Service that she could not afford to retain a lawyer. Rather, she elected to proceed without counsel, confident that the birth certificate of her child would defeat the proceeding. In this context her waiver of counsel was clearly made voluntarily and intelligently (compare the hearing transcript in this record with that in *Burquez* v. *I.N.S., supra* at 752),[10] and the fact that she may have been indigent [11]

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[10] In *Burquez* v. *I.N.S., supra* at 752, a permanent resident alien sought review of a deportation order on the ground that he had been denied due process at his deportation hearing by the absence of counsel. However, the Court of Appeals rejected the petitioner's contention and held that he had waived his right to counsel based on the following colloquy at his hearing:

> THE TRIAL JUDGE: At this hearing you have a right to be represented by an attorney or by any person authorized to practice in these proceedings. Do you understand?
>
> A. Yes.
>
> Q. Have you retained anyone to represent you for this hearing?
>
> A. No.
>
> Q. Are you willing to proceed with your hearing without an attorney and to speak for yourself?
>
> A. I guess I am.
>
> Q. Does that mean you do not wish to have an attorney?
>
> A. I see no reason to. I can speak for myself.

[11] There is nothing in the record to support Petitioner's claim of indigency. To the contrary, the record reveals that she was

[Footnote continued on following page]

does not affect the voluntary nature of her waiver. *United States ex rel. Medich* v. *Burmaster*, 24 F.2d 57 (8th Cir. 1928); *Alves* v. *Shaughnessy*, 107 F. Supp. 433 (S.D.N.Y. 1952).

Finally, even if Petitioner's waiver of counsel had not been voluntary, this would not have been a fatal flaw in the hearing mandating that this case be remanded. The sole issue at the hearing, so far as deportability was concerned, was whether Petitioner had overstayed her authorized visit. It raised no complex issue of law or fact which would have made an attorney's presence useful. No witnesses were called, or could have been called, for there was nothing any witness could supply which might have altered the result. While Petitioner contends there were mitigating circumstances which might have justified her overstay, it is clear that these circumstances might only be relevant to her application for discretionary relief, which was eventually granted. The absence of counsel did not prejudice Petitioner's case as all of the relevant facts concerning deportation were presented to the Immigration Judge. In similar circumstances the Courts have consistently held that such a hearing without counsel does not offend due process. *Castaneda-Delgado* v. *I.N.S.*, *supra*; *Aguilera-Enriquez* v. *I.N.S.*, *supra*, *Dunn-Marin* v. *Dis-*

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admitted to the United States as a nonimmigrant student, which gives reason to believe she had access to a substantial source of funds since such a visa precluded her from working in the United States. [See 8 C.F.R. § 214.2(c)]. The record also indicated that Petitioner was unable to obtain public assistance (JA 51-2) and was granted voluntary departure only after her counsel represented that she had access to funds with which to depart (AR 15, JA 41). It should be noted that, pursuant to normal Service procedure, as soon as a possible claim of indigency was made by Petitioner, the Immigration Judge immediately stated he would request that the Service employees refer Petitioner to legal aid (AR 76, JA 47) [*See*, 20 I & N Reporter 48, 49 (April, 1972)].

trict Director, 426 F.2d 894 (9th Cir. 1970); *Barthold* v. *I.N.S.*, *supra*; *Strantzalis* v. *I.N.S.*, 465 F.2d 1016 (3d Cir. 1972); *Tupacyupanqui-Marin* v. *I.N.S.*, *supra*; *United States* v. *Gasca-Kraft*, *supra*; *Villanueva-Jurado* v. *I.N.S.*, 482 F.2d 886 (5th Cir. 1973); *Rosales Cabellero* v. *I.N.S.*, 472 F.2d 1158 (5th Cir. 1973); *Martin-Mendoza* v. *I.N.S.*, *supra*.

C) The Immigration Judge's interrogation of petitioner was done in accordance with the law, and his finding of deportability was based upon clear and convincing evidence.

Petitioner contends that her hearing was unfair because the procedure employed by the Judge to determine the truth of the allegations in the order to show cause and to ascertain her deportability did not comply with the Service's regulations (Appellant's Brief, at 43-47). Neither the law nor the record support this contention.

An Immigration Judge at a deportation hearing is required to ask the respondent whether she admits the order to show cause's factual allegations and the charge of deportability resulting therefrom. 8 C.F.R. § 242.16(b). The Second Circuit, in a *per curiam* opinion, stated that this procedure did not violate due process. *Henriques* v. *I.N.S.*, *supra*, at 120; *Laqui* v. *I.N.S.*, 422 F.2d 807 (7th Cir. 1970). The Courts have uniformly upheld deportation orders based upon admissions obtained through this procedure and upon the Judge's ultimate conclusion that no issues of law or fact remain. *Id.*; 8 C.F.R. § 242.16(b); *Strantzalis* v. *I.N.S.*, *supra*; *Tupacyupanqui-Marin* v. *I.N.S.*, *supra*. The procedure which the Immigration Judge followed in Petitioner's deportation hearing complied in all respects with the requirements of 8 C.F.R. § 242.16(b).

Petitioner also claims that the Judge's decision of deportability was not based upon clear and convincing evidence. 8 C.F.R. § 242.14(a). This assertion is refuted by the record. Each time the Judge asked Petitioner whether she admitted an allegation contained in the complaint, Petitioner answered "Yes" (AR 71-72, JA 42-43). When asked if she was deportable, she responded unequivocally, "I admit it" (AR 72, JA 43). The Immigration Judge and the Board correctly concluded that the question of the clarity or competence of Petitioner's responses would not be affected even if Petitioner mistakenly believed that her citizenchild could legalize her immigration status. Once Petitioner admitted both the allegations in the order to show cause and her deportability, there were no other issues left to be decided. The Judge properly postponed Petitioner's remarks about the birth of her baby until he addressed the question of voluntary departure.

The procedures used by the Judge in Petitioner's deportation proceedings were consistent with the regulations approved by this Court in *Henriques* v. *I.N.S.*, *supra*. Consequently, the Judge's decision, affirmed by the Board, that Petitioner was deportable solely on the basis of her admissions was proper and not violative of due process. 8 C.F.R. § 242.16(b); *Henriques* v. *I.N.S.*, *supra*; *Laqui* v. *I.N.S.*, *supra*; *Strantzalis* v. *I.N.S.*, *supra*; *Tupacyupanqui-Marin* v. *I.N.S.*, *supra*.

POINT III

The Board Properly Exercised Its Discretion In Granting Petitioner The Privilege Of Voluntary Departure Within Thirty Days.

The Board's Order in part sustained Petitioner's appeal from the Immigration Judge's denial of voluntary departure. It stated that Petitioner would be "permitted to depart voluntarily from the United States at no expense to the Government within 30 days from the date of this Order and under such conditions as may be fixed by the District Director." (AR 15, JA 4). This Order was premised upon representations that Petitioner had sufficient funds to depart at her own expense and was willing to do so voluntarily. This meant that the minimal criteria (set forth in 8 C.F.R. § 244.1) governing the discretionary granting of voluntary departure were satisfied.

Petitioner claims that these terms of the Order denied her due process because it chilled her statutory and constitutional right to appeal to this Court, and constituted an abuse of discretion because it was used to inhibit a good faith petition to review a final order of deportation. Appellant's Brief, at 49. Both contentions ignore the facts upon which voluntary departure was granted, which include Petitioner's state of mind as represented to the Board, and the various procedural avenues open to Petitioner to preserve the voluntary departure portion of the Order despite a later petition for review. Each of these factors obviates the need to reach the issues posed in Petitioner's brief.

To qualify for the privilege of voluntary departure Petitioner had to, and did, represent that she was "willing and has the immediate means with which to depart

promptly from the United States." 8 C.F.R. § 244.1. Such a representation is inconsistent with the prosecution of an appeal regarding deportability. A request for voluntary departure presumes deportability by asking the Service to waive its rights to a deportation order in return for the prompt departure of the alien at no government expense. In accepting Petitioner's representation that she was willing to depart, the Board properly assumed that Petitioner had no intention to seek judicial review of the deportation order, and had no reason to draft the order's terms to accommodate a possible appeal.

Petitioner never brought before the Board her intention to seek judicial review. She did not attempt, pursuant to administrative regulation, to obtain an extension of her departure date so that an appeal could be prosecuted. See 8 C.F.R. § 244.2. Nor did she file a petition for review with this Court within the thirty day period granted and then seek a stay of that provision of the Order pending appeal.

Instead, Petitioner and her counsel did nothing, allowing the voluntary departure date to lapse. Consequently, the Service did not have the opportunity to consider whether Petitioner's voluntary departure time should be extended pending the final resolution of this appeal. The Supreme Court, in *Yakus* v. *United States*, 321 U.S. 414, 439 (1943), denied a similar premature application for relief from the courts, made on due process grounds, when the rules of the administrative agency provided a means for obtaining the requested relief from the agency:

> "Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending

> its administrative and judicial review. Hence, we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process".

Assuming *arguendo* that voluntary departure under 8 C.F.R. § 244.1 and a petition for judicial review are not mutually exclusive, and that Petitioner could not have applied to the Service for relief from the voluntary departure termination date, the voluntary departure terms of the Order do not violate the requirements of due process. The right to appeal from a civil administrative decision is not an element of due process. *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1971). However, since this right of appeal has been granted by Congress, due process does not permit it to be withdrawn arbitrarily. *Oppenheimer* v. *Roth*, 468 F.2d 901 (9th Cir. 1972); *Robinson* v. *Beto*, 426 F.2d 797 (5th Cir. 1970). But, like many other rights, it may be waived. *Wilson* v. *Pantasote Co.*, 254 F.2d 700 (2d Cir. 1958); *Greenspahn* v. *Joseph E. Seagram & Sons*, 186 F.2d 616 (2d Cir. 1951).

Petitioner was represented by counsel when her application to the Board for voluntary departure was made and granted. The application for, and granting of, voluntary departure is analogous to the settlement of a case, *i.e.*, the Petitioner requests voluntary departure in return for her willingness to leave the United States without further judicial review. Such a "settlement" of the administrative proceeding does not conflict with the review procedures of the Act or with the requirements of due

process.[12] *Thonen* v. *Jenkins*, 455 F.2d 977 (4th Cir. 1972); *Wohl* v. *Keene*, 476 F.2d 171 (4th Cir. 1973); *Wilson* v. *Pantasote Co.*, *supra*.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
September 7, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Respondent.

ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney,
RICHARD J. MCCARTHY,
Assistant United States Attorney,
Of Counsel.

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[12] *Khalil* v. *District Director*, 457 F.2d 1276 (9th Cir. 1972) is the only decision cited by Petitioner in which the Circuit Court modified the terms of a Board's voluntary departure order. Appellant's Brief, at 62. The facts of that decision are substantially different from those presented by Petitioner's case, and the Court's conclusion was reached on these facts, not on the due process grounds asserted by Petitioner.

In *Khalil* the Ninth Circuit affirmed the Board's finding that Khalil should be deported because she had not satisfied her burden of showing that she would be persecuted in the United Arab Republic for her political beliefs. However, there was a question as to which country Khalil should be deported. The Circuit Court apparently wanted Khalil to have time within which to make arrangements for deportation to a country other than the United Arab Republic without losing the opportunity for voluntary departure. Thus, the Court extended her voluntary departure date for sixty days.

ADDENDUM

I & NS Investigator's Handbook, page 7-8:

9. If the person indicates he desires counsel but claims he is without funds, he should be apprised of any Legal Aid Society, Legal Services Division of the local Office of Economic Opportunity, or similar organization which provides legal services for indigents. He should also be informed that this Service has no authority to provide counsel in deportation proceedings; however, if criminal proceedings are commenced, the court is authorized to assign counsel for an indigent defendant.

★ Government Printing Office 1976— 614—350—184

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-4130

State of New York)
County of New York) ss

Pauline P. Troia,

being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

10th day of **September**, 19**76** she served **2** copy of the within **govt's brief**

by placing the same in a properly postpaid franked envelope addressed:

Robert S. Catz, Esq.,
Urban Law Institute
1624 Crescent Place, N.W.
Washington, DC 20999

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

10th day of **September**, 19**76**

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977